Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 2004

DIANE SANK,

Petitioner,

v.

THE CITY UNIVERSITY OF NEW YORK, ET AL,

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Diane Sank
Petitioner *Pro Se*
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QUESTIONS PRESENTED

I. Whether the New York City Commission on Human rights (a municipal agency), its Commissioner, and staff attorneys may be dismissed on the ground of qualified immunity from an action based on Constitutional violations of due process and equal protection?

II. Whether leave to file an immediate interlocutory appeal should be granted when the New York City Commission on Human rights (a municipal agency), its Commissioner, and staff attorneys are dismissed on the ground of qualified immunity from an action based on Constitutional violations of due process and equal protection?

III. Whether the New York City Commission on Human rights (a municipal agency), its Commissioner, and staff attorneys have absolute immunity from suit?

IV. Whether agents of an employer may be sued and held individually liable for their violations of Title VII, 42 U.S.C. § 2000e-2 (employment discrimination) and 42 U.S.C. § 2000e-3 (retaliation)?

V. Whether the City University of New York has 11th Amendment immunity from suit as an "arm of the state?"

VI. Whether liability for employment discrimination, pursuant to Title VII, 42 U.S.C. § 2000e-2, attaches if one of the motivating reasons given for the discriminatory act is discriminatory and other reasons are arguably non-discriminatory?

VII. Whether dismissals of Title VII claims on motions for summary judgment are appropriate when heightened standards of review and evidentiary standards of review are used instead of the standard of Rule 56(e) of the Federal Rules of Civil Procedure, i.e. does a genuine issue as to material fact exist?

VIII. Whether the supervisory power of the Supreme Court should be applied to a federal Court of Appeals decision which held that all of Petitioner-Appellee's arguments were without merit but due to the brevity of their decision, denied Petitioner and this Supreme Court the benefit of their reasoning as to how the relevant laws and case precedents applied to the facts and issues raised below in the instant case.?

LIST OF PARTIES

Pro se Petitioner, Diane Sank ("Sank" or "Petitioner"), is a white woman, over the age of 73, who is a Professor of Anthropology, employed as such since 1968 by the City College of the City of New York ("CCNY") which a satellite college of the City University of New York. At all times mentioned in the complaint, she was and still is a resident of New Jersey and a citizen of the United States.

These following are Respondents including individuals sued in both their official and individual capacities:

The City University of New York ("CUNY"),

Defendant Joseph S. Murphy, CUNY Chancellor from 1987 to 1990,

W, Ann Reynolds, CUNY Chancellor beginning in September 1990,

James P. Murphy, CUNY Board of Trustees Chair from 1987 until the complaint was filed in this action,

The CUNY Board of Trustees of CUNY as constituted in April of 1988, including Paul P. Baard, Blanche Berstein, Sylvia Bloom, Maria Josefa Canino, Louis C. Cenci, Armand D'angelo, Judah Griebetz, William R. Howard, Harold M. Jacobs, Flerida Negron, Robert L. Polk, Joaquin Rivera, J.D., Margaret A. Titone, Shirley Ullman Wedeen, and Brenda Farrow White;

The CUNY Board of Trustees of CUNY as constituted in c. June and c. September of 1989, including Gladys Carion, Michael J. Del Guidice, Edith B. Everett, Stanley Fink, Charles E. Innis, Jean C. Lamarre, Susan Moore Mourner, Abdullah Muhammad, Gregorio Mayers, Robert A. Pickens, Calvin O. Pressley, Ronald Quartimon, and Thomas Tam;

The CUNY Board of Trustees as constituted c. June 1990 through the April, 1992 term of office;

Bernard Harleston was the President of CCNY,

Jeffrey R. Rosen was Dean, Division of Social Science , CCNY,

Anthony F. Rodriquez, a/k/a Pacheko, Assistant Vice President of Facility and Space Planning of CCNY,

Carole Laderman, Chair and Professor in the Department of Anthropology (the "Department") of CCNY,

Fremont E. Besmer, Professor of Anthropology and Acting Department Chair in 1989-90 and 1992-93 at CCNY,

June Nash was a Professor, Professor of Anthropology from 1971 until c.1998 at CCNY,

Beverly Sowande, Associate Counsel in CUNY's General Counsel's Office and its Freedom of Information Appeals Officer,

The Commission on Human Rights of the City of New York ("Commission"),

Dennis Deleon, Commissioner in the Commission,

Randolph ("Randy") Wills, Esq., Managing Attorney in the Commission's Law Enforcement Bureau,

Stephanie Orteleiva, Esq., Supervising Attorney in the Commission's Law Enforcement Bureau, and

Lizbeth Schalet, Esq., Attorney in the Commission's Law Enforcement Bureau.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a Writ of Certiorari to review the Summary Order of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS AND ORDERS ENTERED BELOW

An unpublished Summary Order of the Second Circuit Court of Appeals was decided on August 17, 2004, (App., 1a-7a) in which the court held that "all of [petitioner's] arguments on appeal are without merit. We, however, discuss in brief some of her contentions." (App., 3a).

Because of the Circuit Court's brevity and the fact that Petitioner filed her initial complaint on October 1, 1988, her appeal to the circuit court encompassed 16 years of protracted litigation, including determinations by the New York City Commission on Human Rights (hereinafter referred to as "Commission") and the U.S. Equal Employment Opportunity Commission (hereinafter referred to as "EEOC"), as well as various orders and nine written decisions by the Southern District Court of New York, all of which are cited below and included in the appendix.

On January 24, 1993,the Commission issued their "Determination and Order after Investigation" (App., 169a-182a) which was at odds with its investigation report submitted on July 24, 1991 (App., 236a-246a). Although the investigation culminated in a finding of "probable cause" for settling or litigating Petitioner's claims of discrimination and retaliation, the Commission's determination held that there was "no probable cause."

On October 19, 1993, in lieu of orders, the EEOC executed "right to sue in federal court" letters, (App., 163a-168a), wherein the EEOC accorded substantial weight to the Commission's findings.

On January 18, 1994, Petitioner timely filed in federal District Court. On May 24, 1995, the District Court dismissed

defendants who were agents of the City University of New York (herein after referred to as "CUNY") and held Petitioner's §1983 claims time barred. *Sank v. City Univ. of N.Y*, 1995 U.S. Dist. LEXIS 7021, 1995 WL 314696 (S.D.N.Y. 1995); (App., 147a-162a).

On November 10, 1995, in an order handwritten on the Commission's Notice of Motion, the District Court dismissed the Commission and the individual Commission defendants on grounds of immunity. (App., 145a-146a).

On February 13, 1997, the District Court denied Petitioner's request for reconsideration of leave to file interlocutory appeals on the May 24, 1994 and November 10, 1995 orders by characterizing them as interlocutory orders, rather than final judgments. *Sank v. City Univ. of N.Y*, 1997 U.S. Dist. LEXIS 1468, 1997 WL 65910 (S.D.N.Y. 1997). (App., 141a-144a).

On June 26, 1997, on motion, the District Court dismissed the remaining individual CUNY defendants from the action, citing as authority, *Tomka v. Seiler Corp.*, 66 F.3D 1295, 1313-16 (2d Cir. 1995). *Sank v. City Univ. of N.Y*, U.S. Dist. LEXIS 9045 (S.D.N.Y. 1997). (App., 134a-138a).

On April 5, 2002, the District Court granted the defendants' motion to dismiss CUNY's FOIL officer and their motion to strike the jury, as well as dismissing Sank's state claims. *Sank v. City Univ. of N.Y*, 94 Civ. 0253 LEXIS 5928 (S.D.N.Y. 2002). (App., 111a-132a).

On April 12, 2002, the District Court ordered the defendants to produce discovery within 30 days or file an affidavit that they did not have the information or could not reasonably locate it. *Sank v. City Univ. of N.Y*, 94 Civ. 0253 LEXIS 6253 (S.D.N.Y. 2002). (App., 106a-110a).

On August 2, 2002, the District Court denied the defendants' motion to dismiss Sank's remaining claims but granted dismissal of a retaliation claim involving threats to take Petitioner's research computer. *Sank v. City Univ. of N.Y*, 219 F. Supp. 2d 497 LEXIS 14034 (S.D.N.Y. 2002). (App., 80a-91a).

On August 2, 2002, the District Court issued a second Opinion that 1) decreed a bench trial for her pre-1991 Title VII claims, and 2) denied reconsideration of the Order April 12, 2002 order which denied additional time for discovery. This Opinion did, however, modify the April 5, 2002 Opinion by restoring Appellant's right to a jury trial and damages on any retaliatory actions occurring after November 21, 1991. *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 14032 (S.D.N.Y. 2002). (App., 92a-105a).

On September 30, 2002, the bench trial culminating in an Oral Opinion on October 1, 2002 in which the Court found for the Defendants. (App., 66a-79a). During the trial, the District Court initiated an *ex parte* conference (App., 231a-232a)., with the defendants' attorney, inviting them to file a summary judgment for petitioner's remaining claims.

On April 4, 2003, the Court granted the defendants' motion for summary judgment, dismissing all post-1991 retaliation claims by "treating" Petitioner's opposition memorandum as a motion to amend. *Sank v. City Univ. of N.Y*, No. 94 Civ. 0253 (RWS), LEXIS 5471 (S.D.N.Y. 2003). (App., 34a-62a).

On June 19, 2003, upon reargument, the District Court affirmed the April 4, 2003 order and October 7, 2002 Oral Opinion. *Sank v. City Univ. of N.Y*, No. 94 Civ. 0253 (RWS, LEXIS 10396 (S.D.N.Y. 2003), (App., 8a-31a), at which point Petitioner appealed to the 2nd Circuit Court of Appeals.

On August 17, 2004, the Second Circuit affirmed the lower court rulings, paving the way for this Petition. *Sank v. City Univ. of N.Y.*, 03-7677-cv (L), 03-7678-cv (CON), LEXIS 17245 (2nd Cir. 8/17/2004). (App., 1a-7a).

JURISDICTIONAL STATEMENT

The court of appeals entered its judgment on August 17, 2004 (App., 1a-7a) and this Petition was filed within 90 days pursuant to Supreme Court Rules. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND LESSER LAWS AND RULES INVOLVED

The relevant U.S. Constitutional and statutory provisions, as well as relevant rules and regulations involved, are set forth at App., infra, 183a-231a, including

U.S. Constitution, Amendment I (App., 183a)
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U.S. Constitution, Amendment V (App., 183a)
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Administrative Code of the City of N.Y., Human Rights Laws (App., 213a-218a)
The Bylaws of the City Univ. of N.Y. (App., 226a-231a)

STATEMENT OF THE CASE

The Second Circuit Court of Appeals had jurisdiction to render a summary order pursuant to 28 U.S.C. § 1291 which disposed of all the issues raised by the decisions rendered by the Southern District Court of New York.

The Southern District Court of New York had jurisdiction to render decisions on Petitioner's Title VII, state contract, and U.S. Constitutional claims pursuant to 42 U.S.C. § 2000e, *et seq*, Civil Rights Act of 1964, and as amended in

1991, 42 *U.S.C.* § 1983, 42 U.S.C. § 1331, 42 *U.S.C.* § 1332, and 42 *U.S.C.* § 1343.

Petitioner is a Professor of Anthropology at CCNY. At all relevant times, she was a resident of New Jersey. She was instrumental in the creation of the Department of Anthropology (hereinafter referred to as the "Department") and was elected as its first Chairperson, serving in that capacity from 1969 through 1971.

From 1971 through 1987 she immersed herself in teaching, research, writing, and the creation of a Museum of Anthropology at CCNY. For 21 years Sank pursued her research with her own personal funds and equipment, as well as utilizing grant monies she received for her various research projects. In addition to an office and classrooms, CCNY provided Sank with an 800 square feet room to house her research laboratory, museum, and a computer which was hardwired and contained unique software relevant for her ongoing research projects.

During her initial stewardship as Chairwoman, the Department grew from five professors to 22. Student enrollment grew from zero to 1,500 students. The numbers majoring in Anthropology grew from 15 to 120. In 1987 when she was again elected Chairwoman, the enrollment had dropped to 200 students and only six professors remained. Within four months of resuming as Chair of the Department, student majors again climbed from 15 to 40, and enrollment jumped to 350 students -- a 34 percent increase over the previous year!

Her election as Chairperson came at a time of growing concern about the future of the Department. The Department faculty discussions often centered on the new Core Curriculum imposed by the Administration which required the faculty to teach novel courses outside their fields, despite their heavy seven course teaching load and it decentralized their traditional methodologies of teaching Anthropology.

The faculty became more unsettled when they became aware that the Department was being scrutinized by the administration inasmuch as the CCNY President, Bernard W.

Harleston (hereinafter referred to as "Harleston"), commissioned a two person Outside Review Committee (hereinafter referred to as "ORC"), to evaluate the Department and to make recommendations for change. Following a two day visit, the ORC issued a report on January 13, 1988, wherein the ORC reached the conclusion that the Department was unable to govern itself and recommended, *inter alia*, that the Department be put in "semi-receivership," Sank be removed as Chairwoman, and a person from outside the Department appointed in her stead. It also recommended three candidates for the position of Acting Department Chair, including Delmos Jones, a Black male, and two white females.

On February 29, 1988, Harleston called the entire Anthropology Department into his office, informing them that he was considering appointing Delmos Jones as Acting Chair, and by inference, removing Sank. On March 31, 1988, he called a special meeting of the Faculty Council and the Faculty Senate executive committee and told them he was removing Sank as Chairman. On April 27, 1988, Sank received Harleston's formal letter confirming her removal and Jones' appointment. Harleston justified her removal by stating that he was "acting on the advice" given by members of the Department, and cited Section 9.1c of the *Bylaws of The City University of New York*" as his authority. (App., 228). During the bench trial held sixteen years later, the District Court found that Harleston's actions were also justified as part of Harleston's personal affirmative action plan which favored the hiring of Black males. (App., 68a-69a).

Following the receipt of Harleston's letter (App., 246a). and before the CUNY Board of Trustees acted upon her removal and appointment of Dr. Jones, Sank sought access to the Board of Trustees' forum – but the By-Laws were designed to prevent access or contain notice provisions. (App. 226a).

Unable to obtain redress, Petitioner filed dual complaints with the New York City Commission on Human Rights and the EEOC. The Commission assigned attorneys to handle her case. Following an intensive investigation, the Commission

investigator found "probable cause" and "credibility issues that [could] only be resolved in a law enforcement bureau initiated settlement or public hearing." (App., 246a). Petitioner was then told by Commission attorneys that unless she went to mediation, the determination would be changed to "no probable cause." Eighteen months later the Commission issued a Determination which was at odds with the investigator's findings (App., 169-182), and on October 19, 1993, the EEOC issued Petitioner right to sue in federal court letters. (App., 163-168).

It should be noted by this Court that from the time Petitioner amended her Commission complaint to add a claim of racial discrimination, she was plagued by continuous acts of retaliation by Harleston's administration which used every academic administrative process at their command to make Petitioner's professional life as untenable as administratively possible -- given the extreme difficulty of firing a tenured full professor with a 20 year service record as a respected Anthropologist.

The injurious acts clearly presented a continuous pattern of retaliation. Each time Sank made an administrative request, she was denied. Every time the administration could take a privilege away, they took. Without notice, the administration seized Sank's research lab, computer, and her personal collection of Anthropology Museum artifacts. The administration refused to grant sabbatical leaves and assignments to academic advising. Harleston publicly embarrassed Sank in the *New York Times* and to her colleagues in the Faculty Council and Senate. Attempts were made to file false reports in her personnel files -- but failed because she had evidentiary documents proving their falsehood). The list goes on . . . almost *infinitum.*

Petitioner filed her federal complaint, *pro se*, on January 18, 1994 and an amended complaint was filed on May 27, 1994. On May 24, 1995, the District Court dismissed defendants who were agents of the City University of New York (herein after referred to as "CUNY") and held Petitioner's 28 U.S.C. § 1983 claims were time barred by a

three year statute of limitations, citing *Owens v. Okure*, 488 U.S. 235, 102 (1988); *Sank v. City Univ. of N.Y*, 94 Civ. 0253 (RWS), LEXIS 7021 (S.D.N.Y. 1995); (App., 147a-162a). Thus, began the District Court's process of "whittling" away Petitioner's claims and defendants over the next eight years of litigation.

It is clearly manifest that the strategy of the court, was to strip Sank of individual defendants and multiple claims of retaliation, leaving only CUNY as the sole remaining defendant.

On November 10, 1995, the District Court handwrote on the Commission Defendants' notice of motion, their dismissal from the federal action. (App., 145a-146a). On February 13, 1997, the District Court, clarified that "By Decision and Order dated November 10, 1995, the Court dismissed Sank's claims against defendants the New York City Commission on Human Rights (the "Commission"), Dennis de Leon, Stephanie Orteleiva, Lizbeth Schalet and Rudolph Will (collectively, the "Commission Defendants") on *qualified immunity* grounds." (emphasis added), (App., 142a), *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 1468 (S.D.N.Y. 2/13/1997). Upon reargument the District Court reaffirmed the order and denied Sank's request for immediate appeal, stating that such appeals were granted "only to final judgment[s]' and not to interlocutory orders," ignoring *Scheuer v. Rhones*, 416 U.S. 232 (1974). (App., 139-140). The District Court also denied Petitioner request for leave to file an immediate appeal on this decision. (App., 139a-140a). The 2nd Circuit Court upheld the decision on the ground of *absolute* immunity but did not address Appellee Sank's argument that the Commission's rules were unconstitutional as applied and the District Court's denial of an interlocutory appeal denied her a fair hearing. (App., 4), *Sank v. City Univ. of N.Y.*, 03-7677-cv (L), 03-7678-cv (CON), LEXIS 17245 (2nd Cir. 8/17/2004).

Next, the District Court stripped Petitioner of the remaining individual CUNY defendants, citing *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1313-1316 (2d Cir. 1995) for the premise that "individual defendants, even those with

supervisory capacity, could not be held personally liable for alleged violations of Title VII." (App., 137), *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 9045 (S.D.N.Y. 6/26/1997) and again denied Sank leave to file an interlocutory appeal. (App., 133). The instant 2nd Circuit again affirmed the District Court decision, citing a case which followed *Tomka*. (App.,4) and did not address the denial of Sank's subsequent request to file an interlocutory appeal, or the federai questions expressly raised.

On April 5, 2002, the District Court dismissed Sank's state contract claim against CUNY. Sank claimed that the individual Defendants and the institutional Defendant CUNY had unconstitutionally (without notice or forum) deprived her of a valuable property right (the chair of her Department) which was covered by the terms of her Union Contract. (App., 129), *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 5928 (S.D.N.Y. 4/5/2002). The District Court held that CUNY's senior colleges were "arms of the State" entitled to Eleventh Amendment immunity and that federal courts lacked jurisdiction to hear breach of contract claim against state entities, including CUNY because the New York Court of Claims had exclusive jurisdiction over such claims, thus ignoring *Regents of the University of California v. John Doe*, 519 *U.S.* 425 (1997) which held that whether a particular agency was an arm of the state was a federal (not state) question, and a matter of federal (not state) law. The instant Court of Appeals agreed with the dismissal of this claim based on CUNY's "arm of the state" status (App., 4).

On April 15, 2002, Defendants sought summary judgment dismissal on all of Sank's claims. Sank countered with evidence that she had not yet received the discovery ordered by the Court Order dated April, 5. The Court ordered the Defendants to produce discovery or a sworn affidavit of compliance and delayed the summary judgment hearing for another 30 days after compliance. (App., 106a-110a), *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 6253 (S.D.N.Y. 4/15/2002).

On August 2, 2002, the District Court denied Defendants summary judgment and dismissal of Sank's retaliation claims (except for a retrenchment claim) and pointed out that the Defendants had not even properly challenged certain claims and restored Sank's right to a jury trial on those claims occurring after Nov. 1991 when Title VII was amended to allow damages and jury trials. (App., 92a-105a), *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 14032 (S.D.N.Y. 8/2/2002). On the same day, the District Court issued a second opinion, ruling that (App., 80a-91a), the Defendants' summary judgment motion was denied except as to Sank's Title VII retaliation claim based on the threats to take away her research computer which was dismissed (App., 80-91), *Sank v. City Univ. of N.Y.*, 219 F. Supp. 2d 497 LEXIS 14034 (S.D.N.Y. 8/2/2002).

On October 7, 2002, the District Court issued an oral decision following a *pro se* six day bench trial on all pre-1991 Title VII claims but refused to hear Sank's Constitutional claims. On the morning of the trial's second day, the judge held an ex parte conference with the defendant's attorney, inviting him to again bring a third summary judgment motion on Sank's remaining claims. The decision acknowledged that Sank's removal as chair was based, in part on the President's personal affirmative action plan of hiring Black males but ruled for the defendants, including the three retaliation claims. (App., 80-81).

On April 4, 2003, the District Court dismissed Sank's remaining claims on motion for summary judgment (App., 34-65), *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), 5471 (S.D.N.Y. 4/4/2003) and issued a Final Judgment on April 8, 2003. (App. 32-33). On June 19, 2003, the Court heard and denied Sank's motion to amend the factual findings and conclusions of law of the oral decision of October 7, 2002 and her motion for reconsideration of the April 4. 2003 order. (App., 8a-31a), *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 10396 (S.D.N.Y. 6/19/2003), thus leading to her appeal to the Second Circuit Court of Appeals and this Petition

REASONS FOR GRANTING PETITION

The issues presented herein were thoroughly presented to Second Circuit Court of Appeals

I. THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO SETTLE AN IMPORTANT FEDERAL QUESTION WHICH THREATENS THE INTEGRITY AND UNDERMINES PUBLIC CONFIDENCE IN HUMAN RIGHTS LAW: WHETHER THE COMMISSION, ITS COMMISSIONER AND STAFF ATTORNEYS HAVE ABSOLUTE IMMUNITY FOR THEIR INVESTIGATORY AND ADMINISTRATIVE ACTIONS WHICH KNOWINGLY VIOLATE A COMPLAINANT'S CONSTITUTION RIGHTS TO DUE PROCESS AND EQUAL PROTECTION.

In the instant case and in previous cases, the Second Circuit Court of Appeals decided an important question of federal law that has not been, but should be, settled by this Court. To date, this question has successfully evaded this Court's review.

The District Court held that the Commission (a municipal agency) and its attorneys had *qualified immunity* and were immune from suit, then denied Petitioner leave to file an interlocutory appeal despite the ruling of this Court in *Behrens v. Pelletier*, 516 U.S. 299 (1996), which held that an interlocutory order dismissing defendants on grounds of qualified immunity is "an immediately appealable 'final decision,'" citing *Mitchell v. Forsyth*, 472 U. S. 511, 530 (1985).

The 2nd Circuit Court affirmed the District Court dismissal but contradicted the opinion, holding that the Commission's staff attorneys who were acting completely within their prosecutorial capacity had *absolute immunity* from suit, citing *Rudow v. City of N.Y.*, 822 F.2d 324, 327-28 (2d Cir. 1987).[1] Without addressing the two other inherent issues, by inference, the 2nd Circuit also affirmed the District's

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[1] It should be noted that in this case the 2nd Circuit Court recognized the conflict of interest the Commission attorneys faced when dually representing the Commission and a complainant.

Court's dismissal of the Commission and the denial of Petitioner immediate interlocutory appeal.

The importance of settling this issue is that each year thousands of New York city complainants like the Petitioner herein, rely on the integrity and fair treatment of the human rights agencies to litigate or settle their complaints of employer discrimination -- as do tens of thousands complainants across the country. For an example of the number involved: in 2002, the Commission reported "a backlog of nearly 5,000 cases, some dating back as far as 20 years."[2] By the end of 2002, the Commission proudly reported that they had fast-tracked 3,500 cases, finding probable cause to litigate only 1% of these cases.[3] Not surprisingly, the Commission determined that 49% lacked probable cause to litigate or settle.[4] Out of the remaining 50%, only 6% were settled. 44% were subjected to "administrative closure."[5]

Petitioner submits that if the Commission and its attorneys are not held accountable for their Constitutional violations, they will avoid the legislative intent of Title VII and 42 U.S.C § 1983 and they will continue to trample the rights of their unwitting clients who can not afford private attorneys to protect their civil rights in state or federal courts.

In the instant case, the Petitioner first knew that the Commission attorneys were mishandling her case when they threatened to change their investigator's finding of "probable cause" to "no probable cause" if she didn't mediate or settle – and when she refused, that is exactly what they did after 18 months of stonewalling. In toll, the Commission cost Petitioner five years of emotional distress, irreparable harm to

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[2] New York City Commission on Human Rights website, *2002 Annual Report*, p. 2 at http://home.nyc.gov/html/cchr/pdf/annual.pdf.

[3] Bonfield, *An Institutional Analysis of Agencies Administering Fair Employment Practices Laws (Part II)*, 42 N. Y. U. L. Rev. 1035, 1048-1049 (1967). "[The] vagueness of the probable cause concept makes it a flexible tool in the hands of a commissioner."

[4] *2002 Annual Report, supra.*

[5] *Supra.*

her case as it grew stale and, in all probability, their egregious actions encouraged CUNY defendants to continue the onerous campaign of retaliation in hopes that she would drop her suit.

Petitioner's federal complaint never challenged the Commission's right to decide whether or not to litigate her case. Her claim was based upon the Commission attorneys' failure to use independent judgment when fulfilling their administrative and discretionary functions, or make full disclosure of their conflicts of interests, dual representation,[6] and identity of interest with the city and its sister agencies including CUNY/CCNY, or to disclose that that they were following their own set of rules and procedures for enforcing Title VII rights – not federal rules.

In *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), this Court held that local governments and its agencies were not absolutely immune from 42 U. S. C. § 1983 suits.

Petitioner submits that the Commission and its attorneys were not functioning as advocates or prosecutors when they denied her due process and equal protection. *Mitchell v. Forsyth*, 472 *U.S.* 511, 105 S. Ct. 2806 (1985) held that 1) even the U. S. Attorney General does not have absolute immunity, but 2) he does have qualified immunity for his *prosecutorial* actions. The *Mitchell* Court applied the *Harlow* function test to determine whether the Attorney General should be accorded qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982

In *Buckley v. Fitzsimmons*, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993) this Court recognized the distinction between a criminal prosecutor's preparation for the judicial phase of a criminal process (which was accorded absolute immunity) and an attorney's acts of investigation and administration. which

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[6] See New York City Bar Assoc., Committee On Professional and Judicial Ethics, *Formal Opinion, 1987-3* at App., 220a, which indicates that the Commission attorneys were aware of the conflict of interest in dual representation. See also *Canon 5 of the ABA Canons of Professional Conduct* which state "A Lawyer should exercise independent professional judgment on behalf of a client. (App., 218).

were not immune if they violated a client's Constitutional rights. In the instant case, the Commission attorneys were not criminal prosecutors. They were civil attorneys. The were trying to make the Petitioner mediate or settle, not preparing for litigation. At this point they were not involved in the investigation which was done by a bureau specialist who was a paid investigator.

In *Butz et al. v. Economou et al.,* 438 U.S. 478, 98 S. Ct. 2894 (1978), the Court expressly ruled an official would be held liable in damages under § 1983 if the constitutional right he was alleged to have violated was "clearly established" at the time of the violation.(even when authorized to act under a federal or state statute. Furthermore, an unconstitutional act, even if authorized by statute, is viewed as not authorized and there can be no immunity defense. The *Butz* Court paid tribute to the 1882 Supreme Court justices who held that "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it." *United States v. Lee*, 106 U.S. 196, 220, 229 (1882).

When she drafted her federal complaint, Petitioner added a § 1983 claim against the Commission and its staff attorneys -- but only after months of painstaking *pro se* research, did she finally find out why the Commission attorneys torpedoed her case. She found out that her attorneys were not just her attorneys, but they in fact, dually representing their agency. She also found out that the Commission and her adversary, CUNY, were both city agencies. Both agencies were beholding to the city for financial support and answered to the mayor. She also confirmed that the attorneys were not prosecutors but attorneys who statistically rarely tried civil complaints.

She discovered the numerous Commission rules that had deprived her of due process and a fair hearing on her complaint against the CUNY/CCNY. Title 8 of the *Administration Code of the City of New York* ("*ACCNY*") contains the rules which govern the Commission. *ACCNY* §8-

103 empowers the mayor to make political appointments of all 15 commissioners. (App., 215a). *ACCNY* §8-117 creates conflicts of interest, dual representation, and destroys the attorney-client privilege by providing that "the commission, by its prosecutorial bureau, shall be a party to all complaints," and gives the Commission the power to make its own substantive and procedural rules without oversight. (App., 216a). The Commission is not bound by rules of evidence. *ACCNY* §8-119. (App., 217a). *ACCNY* §8-105(4)(a)(ii) states that "with respect to discrimination alleged to be committed by city officials or city agencies, such investigation shall be commenced *after consultation with the mayor*," thus creating divided loyalties and destroying attorney-client privilege. (emphasis added) (App., 215a). In short, the Commission rules assure biased and unequal treatment of claimants who bring actions against the city and its agencies (including CUNY/CCNY) who all share an "identity of interest."[7] The Commission touts that it represents complainants in civil suits under Title VII – but it does not disclose, that in reality, it represents itself and its paymaster, the city of New York – and in the instant case, shared an legally incestuous relationship with the defendant CUNY.

II. THIS COURT SHOULD GRANT CERTIORARI TO SETTLE THE IMPORTANT FEDERAL QUESTION OF WHETHER THE CLEARLY EXPRESSED LANGUAGE OF 42 U.S.C. § 2000e SUBJECTS EMPLOYER'S AGENTS TO INDIVIUAL LIABIITY FOR THEIR DISCRIMINATORY ACTS.

On June 26, 1997, the District Court dismissed the remaining individual defendants, leaving only the institutional defendant CUNY as a party. The court cited *Tomka v. Seiler Corp.*, 66 F.3d 1295 (2dCir. 1995) as precedent. *Tomka* was the 2nd Circuit's seminal case which ruled that individuals with supervisory control over a plaintiff may not be held personally

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[7] See *Monell* at 658, 690, n. 55, which highlights that a New York City Department has "no greater separate identity from the city than did the Director of the Department when he was acting in his official capacity."

liable under Title VII but that individual liability was permitted under state anti-discrimination law, i.e., the New York Human Rights Law. (App., 134a-138a), *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 9045 (S.D.N.Y. 6/26/1997). The District Court also denied Petitioner's request to certify an interlocutory appeal on this issue on July 14, 1997. (App., 133a).

Despite the express language and clear meaning of Title VII, U.S.C. § 2000e-2(a)(1), the 2nd Circuit Court affirmed the lower court, stating that "under Title VII individual supervisors are not subject to liability," citing *Mandell v. County of Suffolk*, 316 F.3d 368, 377 (2d Cir. 2003), a case which followed *Tomka* but added no further analysis of this reoccurring, profligate issue. (App,. 4). *Sank v. City Univ. of N.Y.*, 03-7677-cv (L), 03-7678-cv (CON), LEXIS 17245 (2nd Cir. 8/17/2004).

Title VII makes it an "unlawful employment practice for an employer (1) to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." The act defines "employer" as a "person engaged in an industry affecting commerce who has fifteen or more employees . . . *and any agent of such a person.*" (emphasis added), 42 U.S.C. § 2000e-2(a)(1), (App., 188a).

Petitioner respectfully requests that this Court grant her petition for many compelling reasons. First and foremost, thousands of complainants rely in good faith on the manifest intentions articulated by its framers and this Court's reassurance that the purpose of Title VII was to fully compensate the victim and deter future discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417, 422 (1975).

Second: as long as this important federal question remains unsettled by this Court, this issue will continue to plague and drain the resources of municipal, state, and federal courts alike. Employer discrimination actions are one of the most ubiquitous forms of litigation in the entire United States.

Third: the instant 2nd Circuit's decision is in conflict with the decisions of other federal circuits – and the federal circuits are in conflict with their state courts.

At last count there were 51 Second Circuit cases alone that cited to *Tomka*! This figure does not include those that go unreported pursuant to the Circuit Court's orders. The number of state and local cases were too exhaustive to count. This issue will not go away!

The following circuits refuse to recognize individual liability: *Lissau v. S. Food Serv. Inc.*, 159 F.3d 177, 181 (4th Cir. 1998); *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 267 (5th Cir. 1999); *Hiller v. Brown*, 177 F.3d 542, 545-46 (6th Cir. 1999); *Gastineau v. Fleet Mortgage Corp.*, 137 F.3d 490, 494 (7th Cir. 1998); *Lenhardt v. Basic Inst. of Tech., Inc.*, 55 F.3d 377, 381 (8th Cir. 1995); *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1189 (9th Cir. 1998); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993) *Gary v. Long*, 59 F.3d 1391, 1398 (D.C. Cir. 1995).

To the contra, many lower courts have held that individual liability is permitted under federal law. See, e.g., *Griffith v. Keystone Steel & Wire Co.*, 858 F. Supp. 802, 805-06 (C.D. Ill. 1994) (interpreting Title VII to permit individual liability); *Vakharia v. Swedish Covenant Hosp.*, 824 F. Supp. 769, 784-86 (N.D. Ill. 1993) (same); *Lamirande v. Resolution Trust Corp.*, 834 F. Supp. 526, 528-29 (D.N.H. 1993) (same).

In addition, the following federal district and state courts find individual liability under state employment discrimination laws: See, e.g., *Dici v. Pennsylvania*, 91 F.3d 542, 553 (3d Cir. 1996); *Comiskey v. Auto. Indus, Action Group*, 40 F. Supp. 2d 877, 891 (E.D. Mich. 1999); *Meara v. Bennett*, 27 F. Supp. 2d 288, 291 (D. Mass. 1998); *Wyss v. Gen. Dynamics Corp.*, 24 F. Supp. 2d 202, 210 (D.R.I. 1998); *Tyson v. CIGNA Corp.*, 918 F. Supp. 836 (D.N.J. 1996); *Broomfield v. Lundell*, 767 P.2d 697 (Ariz. Ct. App. 1988); *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 888 (D.C. 1998); *Genaro v. Cent. Transp., Inc.*, 703 N.E.2d 782, 785 (Ohio 1999); *Schram v. Alberton's, Inc.*, 934 P.2d 483, 488 (Or. Ct.

App. 1997); *Carr v. U.P.S.*, 955 S.W.2d 832, 838 (Tenn. 1997).

In conclusion, Petitioner would ask this court to consider the well reasoned *Tomka* dissent, where Judge Parker used this Court's precedents to support his opinion that "It is well-established that, without some clear indication that Congress intended otherwise, courts must not construe the language of a statute in a manner which renders a provision of that statue mere surplusage." *Tomka, supra* at 1319. Parker reasoned that "The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written," citing *Estate of Cowart v. Nicklos Drilling*, 112 S. Ct. 2589 (1992); *Tomka, supra.* Parker concluded that "Title VII permits an employer and that employer's agent to be held jointly and severally liable for Title VII violations. The language of the statute permits it, canons of statutory interpretation require it, and the object and overriding policy goals of Title VII warrant it." *Supra* at 1324.

III. THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO SETTLE THE IMPORTANT FEDERAL QUESTION OF WHAT FACTORS MUST BE CONSIDERED BEFORE COURTS ACCORD TO A UNIVERSITY 11TH AMENDMENT IMMUNITY AS AN "ARM OF THE STATE."

On April 5, 2002, the District Court dismissed Petitioner's state breach of contract claim, ruling that CUNY, its central administration, and its senior colleges were arms of the state entitled to Eleventh Amendment immunity because CUNY was funded and administered by the State to a great degree. (App., 128a-129a). The court further held that federal courts lacked jurisdiction to hear breach of contract claims against state entities inasmuch as the New York Court of Claims had exclusive jurisdiction over such claims. (App., 129a). *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 5928 (S.D.N.Y. 4/5/2002); (App., 111a-132a).

Upon appeal to the 2nd Circuit Court, Petitioner requested that the court consider this Court's reasoning in *Regents of the University of California v. Doe*, 519 U.S. 425

(1997) before rubberstamping the lower court's dismissal of her state contract claim. In the *Doe* case, this Court discussed the factors which should be considered before granting "arm of the state" immunity but ultimately decided the case on other grounds. Petitioner also argued in her complaint to the lower court, she had invoked federal question jurisdiction, 28 U.S.C. § 1331 (App., 185a); diversity jurisdiction, 28 U.S.C. § 1331 (App., 185a); and supplemental jurisdiction, 28 U.S.C. § 1367 (App., 186a). She also pointed out that federal courts always had jurisdiction on a "federal question" involving a Constitutional immunity question.

On August 18, 2004, the 2nd Circuit Court affirmed the lower court's decision, stating that "CUNY and its colleges are an 'arm of the state,' and both CUNY and CCNY are immune from Sank's breach of contract claims pursuant to the Eleventh Amendment," and citing as precedent *Clissuras v. City Univ. of N.Y.*, 359 F3d 79, 83 (2d Cir. 2004). (App., 4a). *Sank v. City Univ. of N.Y.*, 03-7677-cv (L), 03-7678-cv (CON), LEXIS 17245 (2nd Cir. 8/17/2004), (App., 1a-7a).

Petitioner would ask this Court to note that CUNY was created and developed by the city of New York, not the state. It is composed of senior colleges and community colleges. CUNY is a hybrid creature, not a corporation, but a creation of the city of New York and is funded by both the city and the State of New York.

NY CLS Educ §§ 6201(2) states "The legislature intends that the city university of New York should be maintained as an independent system of higher education governed by its own board of trustees responsible for the governance, maintenance and development of both senior and community college units of the city university." (App., 212a). *N.Y. Educ. Law* § 6204(1) provides that "The control of the educational work of the city university shall rest solely in the board of trustees which shall govern and administer all educational units of the city university. (App., 212a). In *NY CLS Educ* §§ 6201(1) the state legislators expressly articulated that although the state provides CUNY's operating expenses and debt service, CUNY governance "should preserve the city's

participation in the governance of the university created and developed at city expense." (App., 212a). *N.Y. Educ. Law* § 6205 provides that the state and city split the costs of indemnification: 1) the state will indemnify the board of trustees, as well as the teaching and supervising staff of the senior colleges, and 2) the city will indemnify the employees of community colleges for any federal or state court judgments. (App., 212a-213a).

Petitioner submits that there are several compelling reasons for granting certiorari. First, a very important federal question should be settled: whether CUNY is entitled to 11th Amendment "arm of the state" immunity. This issue affects almost every educational system across the country, and although repetitious, the "arm of the state" issue continues to evade review. The current state of the law in disarray -- and conflicts abound between the many Circuit Courts and the confusion reigns in state court decisions..

The 1st Circuit has yet to rule on point, but in *University of Rhode Island v. A. W. Chesterton Co.*, 2 F.3d 1200 (1st Cir. 08/16/1993), a district court denied the University of Rhode Island's remand motion without an evidentiary hearing, relying on an earlier district court decision, *Vanlaarhoven v. Newman*, 564 F. Supp. 145 (D.R.I. 1983) (Selya, J.), which determined that URI was *not* an "arm" of the State for sovereign immunity purposes.

In the 2nd Circuit, in both federal and state courts, there are too many cases to count which accord CUNY arm of the state status. The 3rd and 4th Circuits have yet to rule on this issue.

The 5th Circuit has held that Public universities may qualify for immunity as members of the state team, depending upon "their status under state law and their relationship to state government." *Lewis v. Midwestern State Univ.*, 837 F.2d 197, 198 (5th Cir.) (citing United *Carolina Bank v. Board of Regents*, 665 F.2d 553 (5th Cir. Unit A 1982)), *cert. denied*, 488 U.S. 849 (1988). In *Richardson v. Southern University*, 118 F.3d 450 (5th Cir. 08/04/1997), the court held that Southern University was an arm of the state.

In Tennessee, the 6th Circuit granted "arm of the state" immunity in to a county Board of Education! See *Lillard v. Shelby County Board of Education*, No. 94-5694 (6th Cir. 02/21/1996). Under Ohio law, Kent State University was ruled an "arm of the state" in *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299, 302-07 (6th Cir. 1984).

The 7th Circuit placed heavy reliance on Purdue's financial dependence on the state in determining that Purdue was an arm of the state. *Kashani v. Purdue Univ.*, 813 F.2d 843, 848 (7th Cir. 1987).

In the 8th Circuit a technical college was granted "arm of the state status," *Hadley v. North Arkansas Community Technical College*, No. 94-3703 (8th Cir. 02/14/1996).

The 9th Circuit held that the University was *not* an arm of the state, *Doe v. Lawrence Livermore National Laboratory*, 65 F.3d 771 (9th Cir. 09/11/1995), giving rise to this Court's decision in *Regents of U. of Calif v. Doe, supra.*

The 10th Circuit is all over the playing field. In *Brennan v. University of Kansas*, 451 F.2d 1287 (10th Cir. 1971), the university was given 11th Amendment immunity. This encouraged the New Mexico court to hold that school boards in New Mexico were arms of the state. See *Martinez v. Board of Educ.*, 748 F.2d 1393, 1396 (10th Cir. 1984) which was followed in published and unpublished decisions. See, e.g., *Gonzales v. Mountainaire Pub. Schs.*, No. 93-2297, 1994 WL 599514 (10th Cir. Oct. 31, 1994); *Garcia v. Board of Educ.*, 777 F.2d 1403, 1407 (10th Cir. 1985); *Maestas v. Board of Educ.*, 749 F.2d 591, 592 (10th Cir. 1984). Then in *Sharlene K. Watson, v. University of Utah Medic*, 75 F.3D 569, 106 Ed. Law Rep. 1030 (10th Cir. 01/19/1996) the court ruled that the University of Utah was an arm of the state.

As for the 11th and D.C. Circuits, they have yet to rule on the "arm of the state" issue.

In conclusion, Petitioner submits that unless this Court intervenes, the trend would indicate that all educational institutions will soon become judgment proof. In the interim, the law remains in a state of chaos and the man in the street is

unable to ascertain the rule of law – leading to needless litigation and a waste of judicial resources.

IV. THIS COURT SHOULD GRANT CERTIORARI TO SETTLE IMPORTANT FEDERAL TITLE VII QUESTIONS AS TO WHETHER 42 U.S.C. § 2000E–2(M) APPLIES TO CASES WHERE A DEFENDANT ADVANCES DISCRIMINATORY AND NON-DISCRIMINATORY REASONS FOR HIS OR HER DISCRIMINATORY ACT, AND IN ADDITION, WHETHER THE LEGITIMACY OF THE REASONS, PURSUANT TO *MCDONNELL DOUGLAS CORP. V. GREEN*, BE A FACTOR.

In addition to several summary judgments, Petitioner's claims were subject to bifurcated trials inasmuch as her claims arose before and after the November, 1991 amendments of Title VII which provided for damages and a jury trial.

At the end of the bench, the factfinder found for defendant CUNY on 1) the seminal claim of discrimination wherein President Harleston removed Sank as Chair of her Anthropology Department; 2) a claim based on retaliatory taking of Sank's laboratory and Anthropology Museum without notice and 3) retaliation claims of repeated denials of sabbaticals over a three year period.[8]

The Court orchestrated the bench trial to accommodate the three-step burden-shifting paradigm set forth in *McDonnell Douglas Corp. v. Green*, 411 *U.S.* 792, 802-03 (1973) which in the final analysis became a credibility contest of adversaries advancing mixed motives for the CUNY administration's facially discriminatory acts. Defendants testified to various non-discriminatory reasons that President Harleston removed Dr. Sank (a white older female) as chair and simultaneously replaced her with Dr. Delmos Jones (a young Black male). Sank presented evidence that their reasons were pretextual and that the real reason was a discriminatory violation of Title VII,

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[8] It should be noted by this Court, that Petitioner respectfully requests that she be allowed to fully brief the dismissal of the various retaliation claims which were not addressed in this writ due to page limitations.

i.e., that Sank was removed to advance Harleston's personal affirmative action plan of aggressively hiring Black males for prominent positions.

At the conclusion of the trial, the judge issued his oral opinion which followed the burden-shifting paradigm built from 30 years of *McDonnell-Burdine* rulings. The Court ruled that the non-discriminatory reasons given for Sank's removal proved that the defendant had not violated Title VII.

42 U.S.C. § 2000e–2(a)(1) states "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e–2(m) provides that ". . . an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." See *Palace, Inc. v. Costa*, 123 *S. Ct.* 2148 (2003)[9] and also *Johnson v. Transportation Agency,* 480 U.S. 616 (1987) (emphasis added) where the Supreme Court held that an affirmative action plan must be gender-racially neutral; it can not discriminate against a particular race or gender, *and it can not be used to discharge white employees in order to replace them with black hirees.* See also *United Steelworkers of America v. Weber*, 443 *U.S.* 193, 199 (1979); *McDonald v. Santa Fe Trail Transp. Co.*, 427 *U.S.* 273 (1976); and *Griggs v. Duke Power Co.*, 401 *U.S.* 424, 431 (1971).

In Desert Palace, Inc. v. Costa, 123 S.Ct. 2148 **(2003)**, this Court instructed lower courts, *inter alia* that 42 U.S.C. § 2000e–2(m) means exactly what it says – that when a defendant articulates more than one reason for the facially discriminatory act, and one reason demonstrates

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[9] Before the District Court issued an Amended Judgment, Appellant argued *Costa* as precedent.

discriminatory animus, although the other reasons are non-discriminatory, the plaintiff has made his or her case.

In the oral opinion, the District Court applauded Harleston's personal affirmative plan and refused to recognize it as an impermissible discriminatory reason for removing Sank and simultaneously replacing her with a Black male – trading, in essence, a highly qualified older white female chair for a young Black male who had never chaired a department. The Court commented on Harleston's "course of conduct" that demonstrated that "on a number of occasions, whites and sometimes females were replaced by the administration by black males," and noted that "it is clear that Harleston believes it is entirely appropriate," as was his membership in Sigma Pi Phi, an organization composed of black males that was devoted to the advancement of its members. (App. 69). The Court also mentioned that Sank's statistical data indicated Harleston's course of conduct included a preference for hiring Black males. The Court ruled, however, that "the course of conduct reflected efforts by President Harleston to achieve affirmative action in the university," was not pretext. (App. 69). The Court ignored the fact that CUNY's Affirmative Action Plan called for an aggressive campaign for *recruiting females* and minorities, rather than *hiring Black males*.

In reaching a decision, the District Court ignored the an important factor in the test laid down in *McDonnall*, which is used for testing claims of Title VII discrimination, that when the burden shifts to the defendant, the non-discriminate reasons for the act must be "legitimate." *McDonnell, supra* at 804. In the instant case, the Petitioner advanced the argument that all of the reasons relied upon by the defendants involved breaking the CUNY Bylaws.

It should be also be noted that in the 2nd Circuit, the precepts of *McDonnall* are selectively applied, e.g., with regard to reason given, there is no burden of persuasion, only a burden of production. They dispense with the requirement that a proferred "non-discriminatory" reason be "legitimate" " and "must be legally sufficient to justify a judgment for the

defendant." The Courts still use the Price-Waterhouse mixed motives analysis and test. of *Morris v. N.Y. City Dept. of Sanitation*, 2003 U.S. Dist. LEXIS 5146; 91 Fair Empl. Prac. Cas. (BNA) 942 (S.D.N.Y 2003), citing to Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).

V. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE STANDARD OF REVIEW FOR SUMMARY JUDGMENT AS DISTINQUISHED FROM A HEIGHTENED STANDARD, AND EVIDENTIARY STANDARD.

The 2nd Circuit held "Sank failed to make out a prima facie case that these acts were retaliatory employment actions or that defendants' explanation for these actions were pretextual," and "insofar as these claims were premised on retaliatory acts that were not alleged in the complaint, the district court did not abuse its discretion in refusing to permit Sank to amend her complaint to include these claims because these claims were raised late in litigation and not until eight to eleven years after they occurred." (App., 6).

Upon appeal, Petitioner pointed out that her opposition to summary judgment papers were not a motion to amend, but did contain a list of all the claims that she had plead to the District Court over a period of eight years.

Petitioner first raised post-1991 retaliatory claims in her original federal complaint, then again in her amended complaint. Since the defendants continued their practice and pattern of retaliation after she filed in federal court, she often included a current claims pursuant to Fed. R. Civ. P., *Rule* 10(c). (App. 192a). In 1996 she further documented her claims to date in a motion to reconsider, accompanied by a bound exhibit book which she presented to the Court and the defendants. The Court recognized these many claims in its decision of July 31, 2002,[10] finding that three retaliatory claims presented prima facie cases and footnoted in the

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[10] The District Court pointed out in its July 31, 2002 decision that Sank's allegations were not "new" facts, having been made part of the record beginning as early as 1996.

decision the fact that the defendants had not "challenged" the others so the Court would not address them in that decision. (App.,102a), *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 14032 (S.D.N.Y. 8/2/2002).

Over a year went by and still the defendants refused to challenge many post-1991 claims either by denials or giving a non-discriminatory reason for their retaliatory actions, despite the courts warning. On the second morning of bench trial, while Petitioner asked and was excused to prepare her rebuttal the Court called an *ex parte* conference with the defendant's attorney, inviting him to bring a third summary judgment motion to deal with the remaining post-1991 retaliation claims that were scheduled for the jury trial that would follow the bench trial. See ex parte transcript at App. 231a-232a.

The conference was extremely prejudicial, demonstrating judicial bias and lack of impartiality. It occurred before Sank called a single witness. It telegraphed the fact that the judge had already decided to find for the Defendants – and he was postponing the jury trial to give defendants a third shot at summary judgment. The fact that the judge would schedule such a conference served to surprise, rattle, intimidate, and demoralize the *pro se* Petitioner. In *United States v. Walsh*, 700 F.2d 846, 858 (2d Cir.), *cert. denied*, 464 U.S. 825 (1983), the Second Circuit held that ex parte conferences "should not be conducted except in extraordinary circumstances," and that although ex parte conferences are improper and unnecessary, they do not rise to reversible error until they affect the fairness of the trial, citing *Walsh*, 700 F.2d at 858; and *United States v. Moten*, 564 F.2d 620, 630 (2d Cir.), *cert. denied*, 434 U.S. 959 (1977).

The 2nd Circuit Court ruled that the "ex parte discussion with defense counsel regarding a procedural matter, because no decisions were made during this discussion, and the court immediately informed Sank when she returned that the conversation occurred and a record of the conversation was available, we conclude that this discussion did not affect the fairness of the trial and therefore does not warrant a reversal,"

citing *Robinson v. Cattaraugus County,* 147 F.3d 153, 164-65 (2d Cir. 1998).

Petitioner disagree submits that instead of inviting a summary judgment, the District Court should have imposed sanctions on the Defendants for failure to plead and held for the Petitioner on the unchallenged claims, pursuant to the Federal Rules of Civil Procedure.

Summary Judgment and dismissal of all remaining claims

On motion, Defendants asked that the unchallenged claims be dismissed because Sank did not file a *Southern District Court Local Rule* 56.1 *Statement*, (App. 210a) despite the fact that such a filing was literally impossible, since Sank was never given their non-discriminatory reasons for there acts of retaliation.

The Defendants' points argued two retaliatory claims: 1) "Plaintiff has not demonstrated a causal connection between her Class Schedule in 1993 and her charge of discrimination with the NYCCHR," and 2) "Plaintiff has not demonstrated a causal connection between the Fall 2001 Schedule of classes and her charge of discrimination with the NYCCHR."

Sank argued that Defendants erred in their understanding of the rules regarding Title VII acts of retaliation; that she did not have to prove a relationship back to the initial act of discrimination plead in her NYCCHR/Commission complaint, but only to a protected act close in time to the retaliatory act in question. *Clark Co. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001). Furthermore, defendants were well aware of the unbroken temporal chain of protected activities, including multiple union complaints to the Faculty Senate, and the CCNY ombudsman, as well as amended complaints in federal courts, and claims admitted under Fed. R. Civ. P., *Rule* 10(c). (App. 192a).

Misapplications of the various Standards of Review

When the Defendants filed their third and final summary judgment motion, it was procedural flawed.

Although the Defendants brought a motion for summary judgment, they were actually pleading that Sank's original complaint failed to state causes of action for which relief could be granted. This is why the judge treated her opposition papers as a Rule 15(a) motion to amend. (App., 35). *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), 5471 (S.D.N.Y. 4/4/2003). It also gave the judge the opportunity to use more than one standard of review.

Petition submits that the District Court applied an evidentiary standard of review when determining whether her claims rose to the status of an adverse action, and a heightened evidentiary standard by requiring that she submit a Local Rule 56.1 Statement (App., 209a), before the Defendants answered her amended complaint.

This Court, in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) held

> An employment discrimination complaint need not contain specific facts establishing a prima facie case under the *McDonnell Douglas* framework, but instead must contain only "a short and plain statement of the claim showing that the pleader is entitled to relief, *Fed. Rule Civ. Proc.* 8(a)(2). *** Under the Second Circuit's heightened pleading standard, however, a plaintiff without direct evidence at the time of his complaint must plead a prima facie case of discrimination even though discovery might uncover such direct evidence.

Petitioner submits that facts of this case clearly show that Sanks claims met the *Swierkiewicz* standard of review and that is why defendants never challenged many of her claims.

When dismissing the retaliation claims which the Court had already determined presented prima facie claims, the Court again failed to use the summary judgment standard of review, i.e., whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits *. . . show that there is no genuine issue as to material fact and*

that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *Silver v. City Univ.*, 947 F.2d 1021, 1022 (2d Cir. 1991). The District Court failed to heed the rule that "The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists." *Rodriguez v. City of New York*, 72 F.3d 1051, 1060-61 (2d Cir. 1995) or the rule which says that when "determining whether a genuine issue of material fact exists, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Gibbs-Alfano v. Burton*, 281 F.3d 12, 18 (2d Cir. 2002). (emphasis added).

Petitioner submits that the District Court acted as a fact finder and weighed the evidence when he was supposed to be applying summary judgment rules. For example: Sank claimed that the administration deliberately placed bogus prerequisites for her classes in the college catalogue to deter student registration. When Sank discovered the errors, she immediately reported it to the Registrar, her chair and Dean, who all denied the ability to (or could) correct the errors. The Provost (Dr. Barba) submitted an affidavit in which he stated that he immediately told the Registrar to do the correction. The Registrar then told a college administrator to do the corrections. As proof of the correction, Barba attached a computer printout showing the correction. The District Court thought that Barba's affidavit was credible and printout were credible, despite Petitioner's argument that the affidavit was triple hearsay and violated *Fed. R. Evid. Rule* 803(6) hearsay business records exception.

In conclusion, Petitioner asks that this court grant certiorari to settle the aforementioned standards of review which have long been neglected by this Court.

VI. THIS COURT SHOULD GRANT CERTIORARI IN ORDER TO EXERCISE SUPERVISORY POWER OVER LOWER COURTS TO INSTRUCT THEM ON THE ABUSE OF ISSUING UNPUBLISHED OPINIONS THAT ARE BEREFT OF ANALYSIS AND REASONING APPLIED TO THE ISSUES REVIEWED, THEREBY BURDENING A

PETITIONER AND MAKING THIS COURT'S REVIEW UNNECESSARILY DIFFICULT.

In 1999, *Forbes Magazine* reported that "federal appeals judges disposed of 79% of the 26,819 cases they decided by issuing so-called unpublished decisions, up from 37% in 1977. Over 7% of the unpublished decisions consisted of a single word. Whether curt or long-winded, an unpublished decision isn't precedent. That means the judges can be sloppy. They are not accountable for illogic or inconsistency in the rulings." (App., 233a).

The article was called appropriately, "Justice in the Dark." (App., 232a-246a).

Petitioner, *pro se*, comes to this court from a case she litigated for 16 years. She has survived nine written decisions and over 200 miscellaneous orders, motions, etc.

Petitioner respectfully requests that this Court exercise its supervisory power to instruct the Circuit Courts as to the harm they do to parties like herself who come before them for just decisions but instead receive unpublished decisions that do not speak to the issues presented on appeal or contain reasoning or analysis for their rulings. Petitioner makes this request for herself and the thousands of Petitioners similarly situated.

Petitioner submits that her unpublished decision was fundamentally unfair, with little attempt at due process and equal protection of the applicable laws. Furthermore the decision below is an insult to this Court inasmuch as it too needs a proper judicial record to review.

CONCLUSION

For all of the aforementioned reasons, Petitioner submits that a Writ of Certiorari is warranted and should be granted.

Respectfully submitted, November14, 2004

DIANE SANK, *pro se*